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IN THE

Supreme Court of the United States

October Term, 1941.

No. 1022

IN THE MATTER

—*of*—

WARREN ELDRETH GREEN,
On Habeas Corpus.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support Thereof.

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IN THE MATTER

—of—

WARREN ELDRETH GREEN,
On Habeas Corpus.

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Prayer.

Warren Eldreth Green prays that a Writ of Certiorari issue to review the judgment and Order for Mandate entered December 10, 1941, in the United States Circuit Court of Appeals for the Second Circuit in the above entitled cause.

Question Presented.

The sole question presented in this case is whether the petitioner, on account of his being an Onondaga Indian, re-

siding and living in his tribal relationship in the Onondaga Indian Reservation located within the confines of the territorial boundaries of the State of New York, being a member of the Onondaga Nation of Indians and the Six Nations of Indians (Iroquois Confederacy of Indians), was on the 9th day of May, 1941, not subject to draft in the armed forces of the United States pursuant to the provisions of the Selective Service and Training Act of 1940.

The above question must be answered in petitioner's favor if any one of the following four propositions are true. Each of these four propositions presents a legal question.

1. The treaties entered into between the United States and the Six Nations of Indians secure the petitioner against the draft.

2. The petitioner is not a citizen of the United States in spite of the Act of Congress, Section 3, Title 8, U. S. Code (since repealed) and the Act of Congress known as the Nationality Act of 1940, U. S. Code, Title 8, Section 601, purporting to confer citizenship upon him.

3. Said Nationality Act of 1940 contains a saving clause, namely,

> "The following shall be nationals and citizens of the United States at birth: A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property."

which preserves his right not to be subject to the draft.

4. The Selective Service and Training Act of 1940, Sections 303, 304, Title 50 U. S. Code, on its face is inapplicable to Green.

Statutes and Treaties.

Selective Service and Training Act of 1940, United States Code, Title 50, Section 303, Subdivision A as relevant to this proceeding.

> "Except as otherwise provided in this Act, every male citizen of the United States, and every male alien residing in the United States who has declared his intention to become such a citizen, between the ages of twenty-one and thirty-six at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States. The President is authorized from time to time, whether or not a state of war exists, to select and induct into the land and naval forces of the United States for training and service, in the manner provided in this Act, such number of men as in his judgment is required for such forces in the national interest."

United States Code, Title 50, Section 304, Subdivisions A and B in full:—

> (A) "The selection of men for training and service under Section 3 (other than those who are voluntarily inducted pursuant to this Act) shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the men who are liable for such training and service and who at the time of selection are registered and classified but not deferred or exempted; Provided,

That in the selection and training of men under this Act, and in the interpretation and execution of the provisions of this Act, there shall be no discrimination against any person on account of race or color."

(B) "Quotas of men to be inducted for training and service under this Act shall be determined for each State, Territory, and the District of Columbia, and for subdivisions thereof, on the basis of the actual number of men in the several States, Territories, and the District of Columbia, and the subdivisions thereof, who are liable for such training and service but who are not deferred after classification, except that credits shall be given in fixing such quotas for residents of such subdivisions who are in the land and naval forces of the United States on the date fixed for determining such quotas. After such quotas are fixed, credits shall be given in filling such quotas for residents of such subdivisions who subsequently become members of such forces. Until the actual numbers necessary for determining the quotas are known, the quotas may be based on estimates, and subsequent adjustments therein shall be made when such actual numbers are known. All computations under this subsection shall be made in accordance with such rules and regulations as the President may prescribe. September 16, 1940, 3:08 p. m. E. S. T., C 720, §4, 54 Stat. 887."

Nationality Act of 1940 being Section 601, Title 8 United States Code, Subdivision A and B as pertinent:—

"The following shall be nationals and citizens of the United States at birth:

(a) A person born in the United States, and subject to the jursidiction thereof;

(b) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property."

Act of Congress, March 3, 1871, being Section 71 of Title 25, United States Code as follows:

"Future treaties with Indian tribes. No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

Treaties Applicable.

Treaty between the United States and Six Nations made at Fort Stanwix, October 22, 1784. (Volume 7, United States Statutes at Large, page 15).

This treaty, after declaring certain guarantees and establishing certain boundary lines between the United States and the Six Nations, then went on to guarantee that the Indians of the Six Nations "shall be secured in the peaceful possession of the lands they inhabit east and north" of said boundaries.

Treaty between United States and Six Nations made at Fort Harmar, January 9, 1789, (Volume 7, United States Statutes at Large, Page 33).

This treaty was made "for removing all causes of controversy, regulating trade, and settling boundaries between the Indian nations in the northern department and the said United States, of the one part, and the sachems and warriors of the Six Nations, of the other part." In Article I of this treaty, the treaty of 1784 was referred to, and the contracting parties renewed and confirmed "all the engagements and stipulations entered into at the beforementioned treaty at Fort Stanwix." And again in the treaty of 1789, it states that the "undersigned Indians, as well in their own names as in the name of their respective tribes and nations, their heirs and descendants, for the consideration beforemention, do release, quit claim, relinquish, and cede, to the United States of America, all the lands west of the said boundary or division line, and between the said line and the strait from the mouth of the Ononwayea and Buffalo Creek, for them, the said United States of America, to have and to hold the same, in true and absolute propriety, forever." Article 11 provided that the United States of America "confirm to the Six Nations, all the land which they inhabit, lying east and north of the beforementioned boundary line, and relinquish and quit claim to the same and every part thereof, except only six miles square round the fort of Oswego, which six miles square round said fort is again reserved to the United States by these presents." Article IV declared "The United States of America renew and confirm the peace and friendship entered into with the Six Nations (except the Mohawks), at the treaty

beforementioned, held at Fort Stanwix, declaring the same to be perpetual. And if the Mohawks shall, within six months, declare their assent to the same, they shall be considered as included."

Treaty between the United States and Six Nations made at Canandaigua, New York, on November 11, 1794, (Volume 7, United States Statutes at Large, Page 44).

This treaty provided in Article 1, "Peace and friendship are hereby established and shall be perpetual between the United States and the Six Nations." Article 11 acknowledged the lands reserved to the Oneida, Onondaga and Cayuga Nations in their respective treaties with the State of New York, and called their reservations, to be their property, and vowed that the United States will never claim the same nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; and guaranteed the said reservations to remain theirs until they choose to sell the same to the United States, and Article IV was a guarantee by the Six Nations never to claim the lands within the boundaries of the United States, and never to disturb the people of the United States in the free use and enjoyment of their lands. Article VI provided for certain annual payments to be made to the Six Nations by the United States. Article VII provided that in case of injuries done by the misconduct of individuals on the part of either side, that appropriate complaint should be made by the injured party to the other of the contracting parties, declaring that no private revenge or retaliation shall take place.

Statement.

This proceeding was commenced on the 9th day of May, 1941, when the Hon. Frederick H. Bryant, United States District Judge for the Northern District of New York, granted at the Federal Court House in the City of Syracuse, New York, a Writ of Habeas Corpus on the petition of Rosetta Green, verified the 9th day of May, 1941, wherein the said Writ commanded D. W. McLaren, Major of the United States Army, then at Syracuse, New York, to produce the body of Warren Eldreth Green, together with the date and cause of his being taken and detained, before the Hon. Frederick H. Bryant, Judge of the United States District Court for the Northern District of New York, at the Court House on the 14th day of May, 1941, so that the question of the legality of the custody of said Warren Eldreth Green should be determined. Wilfred E. Hoffmann, attorney, of Syracuse, New York, appeared in said proceeding as attorney for the petitioner and said Warren Eldreth Green. Ralph Emmons, United States Attorney for the Northern District of New York, through Robert J. Leamy, assistant United States attorney for said district, appeared for D. W. McLaren. The petition for the Writ of Habeas Corpus and the Writ of Habeas Corpus were filed with the Clerk of the said district court on the 14th day of May, 1941, the return of D. W. McLaren, Major in the United States Army and in charge of the induction station for Selective Service Act trainees at Syracuse, New York, made and swore to his return on the 14th day of May, 1941, and said return was filed with the Clerk of the district court, on the 14th day of May, 1941. The hearing on said Writ of Habeas Corpus was had before the Hon. Frederick H. Bryant, a Judge of said district court, at the Fed-

eral Court House at Syracuse, New York, on the 14th day of May, 1941. No question was referred to a commissioner or commissioners, master or referee. An order denying the discharge of said Green from custody was made by the Hon. Frederick H. Bryant on the 14th day of May, 1941, and said order was filed with the Clerk of the district curt on the 14th day of June, 1941. A notice of appeal from said order was filed with the clerk of the district court in behalf of said Warren Eldreth Green on July 3, 1941, and a copy thereof was served upon the United States Attorney for said district on the same day. An order extending appellant's time within which to file his record on appeal and docket the appeal in the Circuit Court of Appeals was made by the Hon. Frederick H. Bryant on the 6th day of September, 1941, and said order was duly filed on the 23rd day of September, 1941.

The appeal was argued in the Circuit Court of Appeals on October 20, 1941, and the court made its decision on November 24, 1941, reported in 123 Fed. 2nd, 862 (Federal Reporter, Second Series, Advance Sheets, dated January 19, 1942.) The Order for Mandate was entered in the Circuit Court December 10, 1941.

On May 9, 1941, when said Writ of Habeas Corpus was granted, the said Warren Eldreth Green, was in the custody of Major Donald W. McLaren of the United States Army, having surrendered himself to said custody as a result of a notice mailed to him April 25, 1941, by Local Board #474 at Syracuse, New York, (fol. 23). The Writ of Habeas Corpus referred to above was granted upon petition of said Warren Eldreth Green's mother, Rosetta Green, (fols. 7-16).

At the time Green was in said custody he was a member of the Onondaga Nation of Indians, (fol. 8); he was born in and always lived upon the Onondaga Indian Reservation and never lived separate or apart from his tribe, (fol. 9). He was a member of the Six Nations of Indians, also known as the Iroquois Confederacy (fol. 8). The Onondaga Nation of Indians is located within the confines of Onondaga County, State of New York. This nation is controlled by a body of some eighteen or nineteen chiefs (fol. 58), and they are the sole governing power of the internal affairs of the Onondaga Nation (fol. 58). The Onondaga Nation is one of the Six Nations of the State of New York (fol. 58). The confederacy of Six Nations of the State of New York is controlled by a body of special delegates from each of the respective Six Nations (fol. 59). The chiefs of the Onondaga Nation are appointed to their office by virtue of a special custom and usage which has been prevalent among the Onondagas for a long time before this country was settled by the whites (fol. 59). The Council of Chiefs of the Onondaga Nation has the right to determine disputes that arise upon the reservation (fol. 56). They have the right to enforce their decrees (fol. 57). However, these Indians often use the State and Federal Courts for the settlement of their disputes (fol. 57). The Onondagas claim to own the fee in the land they occupy, and claim that the fee is neither in the State nor in the Federal government, (fol. 60). These New York State Indians have always occupied the land they now possess. They are the original possessors of their soil (fol. 62; and a matter of history).

Upon the above facts the question hereinbefore stated is predicated.

There have been no changes in attorneys or parties in this proceeding, except petitioner is appearing on the application in person.

Rulings of the Courts Below.

The District Court did not dispose of this case upon the merits (fol. 71). The Court in ruling stated:

> "A question of that scope cannot be settled conclusively by any decision of a District Judge. It is a question that must, in order to have a decision carry final weight, be passed upon in some form by a Higher Court. I do not feel that I should interpret it. In these days of hectic defense preparation any interpretation of the so-called Citizenship Act of 1924 and the so-called Selective Service Act, granting, or tending to grant, exemption or exclusion, should not be made by a District Judge."
>
> "On the record and under the statutes, I deny the writ."
>
> "I have made a short record so that Mr. Hoffmann can take the question quickly to a higher Court."

The Circuit Court of Appeals affirmed the decision of the District Court. The Court ruled that the petitioner was subject to the Selective Service and Training Act of 1940. In this connection the Court ruled,

(1) in regard to the treaties by stating "assuming arguendo, the validity of his argument as to the treaty status of the Indian tribe to which he belongs, and the statutes of 1924 and 1940 (Referring to the citizenship acts) yet these statutes are not, on that account, unconstitutional. Where a domestic law conflicts with an earlier treaty, that the statute must be honored by the domestic courts has been

well established at least since the Head Money Cases, 1884, 112 U. S. 580, 5 S. Ct. 247, 28 L. Ed. 798." Green had contended that the United States in negotiating these treaties had recognized the sovereignty of his tribe to which he belongs and therein guaranteed him peaceful possession of his home and to never molest nor disturb him, and that by history and the very force of these treaties he could not be similarly dealt with as those who were truly a part of the government of the people of the United States.

(2) also in regard to citizenship by stating, "whatever doubt there might be concerning the 1924 statute, because of its title, the 1940 statute unequivocally made Green a citizen."

(3) that the saving clause in the 1940 Act to the effect that "the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person or tribal or other property" rather hurts than helps Green's case, "for Congress by expressly excepting property rights, emphasized its intention to impose all other obligations of citizenship."

(4) that the Selective Service and Training Act of 1940 was intended to apply to an Onondaga Indian occupying a position similar to Green because 50 U. S. C. A, appendix, Section 303 (a) includes "every male citizen" and that the provision in Section 304 (b) of the Act for quotas in which reference is made to "the several States, Territories, and the District of Columbia," was intended merely to determine such quotas, and cannot reasonably be said to imply that, for the purpose of determining the persons subject to the Act, those living in Indian Reservations should be excluded.

Reasons for Granting Petition.

It is respectfully submitted that this petition ought to granted for the reason that the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court. Namely, is an Onondaga Indian, living upon his own Onondaga Indian lands, being a member of the Onondaga Indian Nation as well as a member of the Six Nations (Iroquois Confederacy), subject to the Selective Service and Training Act of 1940?

All members of the Six Nations are affected by the ruling already made by the Circuit Court of Appeals. The Act was construed as applicable to these Indians, and this in spite of the repeated holdings of the United States Supreme Court that general acts of Congress do not apply to them, unless so worded as clearly to manifest an intention to include them in their operation. McCandless, Commissioner of Immigration, vs. United States ex rel, Diabo 25 Fed. 2nd 71; United States vs. Reichert, 188 U. S. 432, 23 S. Ct. 478, 47 L. E. 532; Elk vs. Wilkins, 112 U. S. 94, 5 S. Ct. 41, 28 L. Ed. 643; Cherokee Nation vs. Georgia, 5 Pet. (30 U. S.) 17, 8 L. Ed. 25. Again, in Cherokee Intermarriage Cases, 203 U. S. 76, 94, the court held it to be "the settled rule that as between the whites and the Indians the laws are to be construed most favorably to the latter." Perhaps this "settled rule" would be of even greater force in the instant case when it is remembered that these Six Nation Indians were never conquered and in addition have treaty rights with the federal government, in regard to which rights the Act of Congress of March 3, 1871, Section 71, Title 25, United States Code, stated "but no obligation

of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." It is further submitted that the Acts of Congress purporting to confer citizenship upon Green is unconstitutional because under the 14th Amendment to the United States Constitution the authority of Congress to create citizens by naturalization or other statute is limited to persons completely "subject to the jurisdiction" of the United States, and Indians occupying a similar status to Green have never been subject to, or at least completely subject to, the jurisdiction of the United States—and especially so from a political standpoint. See Elk vs. Wilkins, 112 U. S. 94.

In regard to the treaties the Circuit Court of Appeals in the instant case said that where a domestic law conflicts with an earlier treaty, that the statute must be honored has been well established at least since the Head Money cases, supra. However, in the Head Money cases the Supreme Court stated that where a treaty contains provisions conferring rights upon citizens or subjects of one of the contracting nations residing in the territorial limits of another, these are capable of enforcement in our .courts While it is stated that such a treaty may be repealed by an Act of Congress, it would hardly seem that Green would be intended to be subject to the Selective Service and Training Act of 1940, especially in view of the fact that,

(1) he possesses treaty rights with a government which all humanity respects for its fulfillment of its treaty obligations.

(2) section 71, title 25, U. S. Code is still a law.

(3) the fact that Indians, when referred to in

our Constitution, are referred to specifically by name.

(4) Selective Service Act does not refer to Indians of existing organized tribes, nor even to Indians at all.

(5) the questionable power of Congress to make Green a citizen.

(6) the repeated decisions of the U. S. Supreme Court holding Acts of Congress inapplicable to Indians unless so worded as to clearly manifest an intention to include them in their operation and holding laws are to be construed most favorably to them.

(7) the failure to refer to Indian territories or reservations in Section 304 (b) of the Selective Service and Training Act of 1940.

Respectfully submitted,

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